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No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, CALIFORNIA and THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS.

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4 Witkin, California Procedure, 2nd ed., p. 3348 22

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BRIEF FOR THE RESPONDENTS.

STATEMENT OF THE CASE.

A. The July 15, 1977 Refusal to Sell.

On July 15, 1977, two citizens of the Republic of Mexico residing in Mexicali, Baja, California del Norte, travelled to the McDougal Wells, Imperial County, California to purchase water. (38a; 43a) Humberto Martinez and Juan DeLeon are both businessmen who engage in the purchase of water in Imperial County which they then transport across the border for bottling and resale to the citizens and visitors of the Mexicali metropolitan district (37a; 43a), a community where safe and sanitary water is in extremely short supply (39a). The main single source of potable drinking

water for the City of Mexicali was the Clifford Well, County of Imperial, California, where the price of water was $1.40 per thousand gallons, (34a) contrasted with McDougal Wells where the price was 40¢ per thousand gallons less (34a). The McDougal well is also eight miles closer to the International border (34a; 40a).

Mr. Martinez, drove to McDougal wells on July 15, 1977 to purchase the less expensive water which would at the same time increase his number of daily trips, decrease his operating costs (38a) and end his dependence on the unreliable Clifford Well (41a). Upon his arrival defendant McDougal asked him where he lived; he responded Mexicali. Mr. McDougal advised him that since the water was intended for Mexico, he would not sell it to him. McDougal's refusal caused Martinez "economic loss and grief inasmuch as . . . [he] . . . could pass this 40% savings in raw material costs to the citizens of Mexicali, who are in dire need of a safe and sanitary drinking water source." (38a)[1]

Juan DeLeon likewise journeyed to McDougal wells where water was advertised for sale to the general public (43a). Upon his arrival he noticed a sign in both English and Spanish stating water would not be sold for use outside of the County (44a; Clerk's Record on Appeal, P.68-76, Exhibit A). Mr. DeLeon attempted to purchase water from McDougal who inquired where he lived. DeLeon responded that it wasn't any of McDougal's business, that he was simply a member of the general public seeking to purchase water. Mr. DeLeon was then given a declaration (30a-31a) and asked to swear under penalty of perjury that the water

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[1]See also, Declaration of Hugo Hernandez Teran, ENG, Regional Director, B.CFA., Department of Health and Public Assistance, Republic of Mexico (52a-54a)

was not for use outside of Imperial County. DeLeon refused to sign and McDougal refused to sell. (44a)

The third plaintiff, Guillermo Gallego Munoz, like his compatriots, met the same refusal to sell water, the only difference being that he had entered into an agreement with McDougal in June of 1972 to act as his broker in Mexico (32a).

The activities of July 15, 1977 resulted in the present litigation.

B. The Genesis of the Refusal to Sell: County of Imperial v. McDougal.

McDougal's refusal to sell to Martinez, Munoz and DeLeon was based on litigation brought by the County of Imperial several years earlier to prevent the continuation of an intensive trucking operation and the exportation of water without a conditional use permit which the County claimed was required by its zoning ordinance. That litigation culminated in *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977).[2]

In November of 1972, respondent Munoz signed a declaration which defendant McDougal annexed to his answer in the state court proceedings. Munoz in 1972 declared, among other things, that it "was absolutely essential that the City of Mexicali and the City of San Felipe receive water from the Ocotillo basin since that was the only good drinking water within a reasonable distance." (64a-66a) Four years later, in September of 1975, he appeared as *amicus curiae* before the California Supreme Court (67a-84a).

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[2]The opinion of the California Supreme Court in *County of Imperial v. McDougal*, is set forth in the Petition for Certiorari as Appendix "C" (C1-11) Citations hereafter will be to Appendix C.

The state trial court found that McDougal's 1967 conditional use permit restricted sales of water for use only in the County so that intensive land usage, incompatible with surrounding land uses, would be avoided (61a). This finding was *reversed* by the California Supreme Court which found that the evidence was insufficient to support such a finding and that the 1967 restriction was "intended to accomplish only what it clearly states, *i.e.*, a prohibition against exporting water from the County." (C-9)

The trial court also concluded that McDougal's trucking operations were in violation of the County's zoning ordinance requiring a conditional use permit which McDougal did not possess (61a). This judgment was also *reversed* by the California Supreme Court. (C-9)

McDougal, at both the trial and appellate level, asserted the 1967 restriction against export constituted an invalid interference with interstate and foreign commerce. The California Supreme Court refused to consider the question of the restriction's constitutional invalidity since, under state law, ". . . a land owner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (C-6) McDougal was therefore estopped to assert the restrictions invalidity. The court observed at Footnote 3 of its opinion:

> "In view of this conclusion, we need not decide whether the prohibition against the export of water was valid (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 225 F.Supp. 828)" (C-6)

C. The Federal Question in a Federal Court.

It is against this backdrop that respondents brought their action for declaratory and injunctive relief. These citizens

of Mexico, none of whom have been parties to litigation challenging the County and McDougal's ability to exclude them from the class of prospective purchasers, sought to afford themselves of the privileges of the United States Constitution. Plaintiffs wish to engage in interstate and foreign commerce unferreted by a direct prohibition violative of Article One, Section 8, Clause 3 of the United States Constitution granting Congress alone the power "to regulate commerce with foreign nations, and among the several states . . ."

The district court, mindful of the narrow issue before it, issued a preliminary injunction barring the County of Imperial, its supervisors, agents and employees from enforcing that condition in McDougal's use permit prohibiting the sale of water for use outside of the County. (B-10)[3] It did not enjoin any state court proceedings, nor did it prohibit the County from exercising any of its police powers for land use regulation, conservation or other valid local purposes. (B-10-11)

Subsequent to the granting of the preliminary injunction, on February 16, 1978, the County pursued its nuisance remedies (albeit unsuccessfully on appeal, Court of Appeal, Fourth Appellate District, 4 Civil No. 18248, July 23, 1979) as suggested by the California Supreme Court, (C-9) and the federal district court (B-10-11). On March 6, 1979, approximately five months *after* the preliminary injunction, the trial court in an action separate from the nuisance action, entered a contempt judgment against McDougal for selling water for use outside of the County. (D1-2)[4] Later, on March 22, 1979, the trial court stayed its order pending results of

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[3]The District Court's opinion and its order are reprinted as Appendix "B" to Petitioner's Writ for Certiorari (B1-12).

[4]The California Superior Court's contempt orders are set forth in the Petition for Certiorari as Appendix "D" (D1-4).

the federal proceedings. (D-3) McDougal filed a writ of certiorari/prohibition challenging the trial court's contempt citation. The Fourth District Court of Appeal for the State of California on June 5, 1979, stayed enforcement of the judgment of contempt until further order. McDougal's writ is currently pending.

SUMMARY OF ARGUMENTS.

I.

The County of Imperial seeks to enforce an absolute and outright ban on the export of water from McDougal wells outside the County's boundaries. The restriction contained in the McDougal use permit is unrelated to any local purposes of land use regulation as explicitly found by the California Supreme Court and constitutes nothing more than a local agencies attempt to preserve its produce in the most discriminatory manner possible: a *home embargo*.

The Constitution's Commerce Clause is the basic fabric which binds this nation together. Economic fragmentation such as the type at bar has long been condemned as a usurpation of national powers by local interests and dealt with accordingly. This court has recently recognized in *Hughes v. Oklahoma*, ... US ..., 60 L.Ed. 2d 250, 99 S.Ct. 1727 (1979) the continuing viability of this concept by reiterating that state interests which impact interstate and foreign commerce must be served in a manner which is the least discriminatory against that commerce.

If the County of Imperial sought to protect any legitimate local interests they may not be found in the record. For five years the County maintained its restriction was land use oriented only to have California's Supreme Court reject its argument and observe that the restriction is simply what it states, a ban on water export and nothing more. If any other local interests were to be served, not only is the restriction in question the *most* discriminatory against commerce but it is the *least* effective in protecting local interests. If the regulation ever was intended as a land use one, or a water conservation step, would not restrictions on hours of operation, amount of water pumped, number of trucks on the site and the like have been much more effective than a ban

on interstate commerce which allows McDougal to pump and sell as much water for as many hours during the day that he can in local commerce?

Surely, this court will not countenance such a facial and unequivocal ban.

The issue before this court is not could the County of Imperial pick an effective way to regulate McDougal's commercial operation or water appropriation activities, but may it flatly prohibit interstate commerce? The answer must, to preserve the basic principles embodied in the Commerce Clause, be a resounding no!

II.

The California Supreme Court expressly refused to decide the federal constitutional question before this court because the individual before that court was estopped under state law to raise it. No judgment exists on the question presented by these third party litigants seeking to raise constitutional objections to the County of Imperial's *home embargo*.

The action in California between petitioner County of Imperial and its co-defendant McDougal was one primarily interested in enforcing McDougal's use permit, the County zoning ordinance and use permit restrictions allegedly restricting water sales for land use purposes. The County lost its litigation with McDougal in the sense that the California Supreme Court held that additional conditional use permits were not required under the County's zoning ordinance or state law to carry on an intensive commercial water and trucking operation. Nor, said the California Supreme Court, was the County's ban of water export a land use regulation. The constitutionality of that restriction was never reached and it ended up being enforced by default for McDougal was estopped to challenge its validity.

The action before this court in no way seeks to alter or deal with County land use regulations. It states simply a new and separate cause of action challenging, from a prospective purchasers standpoint, a *home embargo*. The prior California judgment was simply not a judgment on the same cause of action before this court.

It is elementary that a judgment does not include issues expressly not decided. The County's argument that the *home embargo's* enforcement which resulted from the California Supreme Court's refusal to reach the question of its constitutionality must fall of its own ponderous weight. That which did not occur cannot serve as the platform from which the spear of res judicata may be cast at those who were not present in the prior proceedings.

The County's arguments that all three plaintiffs in the present action are bound as privys to the results of the litigation between McDougal and the County is equally fallacious. The County contends that they participated in the litigation and were sufficiently close in interest as to be bound to the non decision on the *home embargo's* constitutionality. It is absolutely untrue that these non-parties participated to any degree for purposes of res judicata in the County's prior action. The mere fact that one of the plaintiffs in this action signed a declaration and entered an amicus curiae appearance is insufficient to bind him, let alone the other two non-party plaintiffs, to the proceedings in California's courts. They exercised no control over the California proceedings and were absolute strangers to it but for Mr. Munoz' two isolated acts.

Any pretense that these respondents were "entwined" or closely related with McDougal is sheer wishful thinking by the County. The only connection is that Munoz had a contract with McDougal to broker water sales and Martinez and DeLeon wish to purchase water. To say that McDougal

was therefore qualified to stand in judgment for them does not follow. How can it be said that McDougal prosecuted his lawsuit on these respondents' behalf when the one issue in which these respondents were interested was the very one McDougal was estopped to raise?

To say that since the seller cannot sell the buyer cannot buy is not an answer to these non-parties seeking redress of their rights as purchasers. To so hold would elevate the California doctrine of estoppel way above these non-parties constitutional rights of due process and their day in court.

Lastly, the County's allegation that the prior proceedings were in rem and therefore bind the whole world simply points out the paucity of its argument. Whether labels such as in rem or in personam may apply (or may not since the County has no authority for its proposition) cannot be dispositive of the rights of non-parties to litigate constitutional questions never decided in the previous "in rem," "quasi-in rem" or "in personam" proceedings. Labels do not give rights, the due process provisions of this country's Constitution do.

III.

The federal district court did not enjoin any state court proceeding. It merely enjoined the County of Imperial from enforcing its *home embargo*, leaving California's state judiciary free to decide the effect of the federal decision on its outstanding injunction. California's Superior Court chose to find McDougal in contempt but stayed any enforcement thereof pending review of the federal court proceedings. Likewise the California appellate court has declined to rule on the superior court's contempt citation, preferring to let this court decide the federal questions properly before it. Those very state court proceedings are proof of the pudding

that no state court proceedings have been enjoined in violation of 28 USC 2283.

The anti-injunction statute has, in any event, never been applied against third party litigants not party to state proceedings seeking to raise federal constitutional questions. The injunction here under consideration is governed by this court's decision in *Hale v. Bimco Trading Co.*, 306 US 375 (1938). In *Hale, supra,* the Florida court had held a statute constitutional as against a Commerce Clause question but this court sustained an injunction against its enforcement at the suit of third party litigants. In the present case, California's courts have expressly declined to rule the *home embargo* in question constitutional and *Hale, supra,* makes it perfectly clear that these third parties are entitled to injunctive relief. The anti-injunction statute, 28 USC 2283, simply does not apply to suits brought by third parties and has never been so interpreted.

Even if we assume arguendo that the statute does apply, the current injunction is pursuant to a specific exception created by congress, the Civil Rights Act. Not only is the present action within a congressionally created exception, the injunction is necessary in aid of the district court's jurisdiction and well within 28 USC 2283. The federal court has taken only the limited step by enjoining the County of Imperial from enforcing its *home embargo,* leaving McDougal and California's courts to follow appropriate state courses of action. The federal court, being the only court ever to have both subject matter jurisdiction and jurisdiction over the parties is surely free to enjoin the County from perpetuating a *home embargo* which is on its face unconstitutional.

No previously announced policy of federalism or comity will be served by applying 28 USC 2283 here. The present injunction does not reverse findings of the California Su-

preme Court for it made no findings on the embargo's constitutionality. It causes no duplication of effort since no California court is considering the question. It does not preclude the County of Imperial from enforcing any of its police powers with respect to legitimate local concerns for the injunction is narrowly drawn so as to specifically allow local exercise of the police power. Finally, the only real result of the application of 28 USC 2283 would be to force these plaintiffs to try their federal question in a state forum. The anti-injunction statute is not being raised to effectuate policies of federalism or comity but simply as blatant forum shopping.

ARGUMENT.

I.

THE RESTRICTION IN QUESTION IS AN INVALID HOME EMBARGO VIOLATIVE OF THE COMMERCE CLAUSE.

A. The County of Imperial's Ban on the Export of Water Is on Its Face an Invalid Burden on Interstate and Foreign Commerce.

The County of Imperial seeks this court's blessing of its absolute ban of interstate and foreign export of water from McDougal wells. There is no subtle shading of regulation involved here necessitating the balancing of state and federal interests. These proceedings involve a simple, straight forward and direct ban on engaging in interstate and foreign commerce. The special use permit under which McDougal wells operates states simply that permission to sell water on the premises is subject to the condition that "[t]he water will be sold only for use within the Imperial County." (58a) No questions of local land use regulation are involved, only a flat ban against sale. *County of Imperial* (C-7-8)

These federal plaintiffs seek resolution of a federal question in accordance with the self-executing provisions of the Commerce Clause. The self-executing nature of the Commerce Clause is well settled: "By its own force [it creates] an area of trade free from interference by states . . . [t]he Commerce Clause even without implementing legislation by congress is a limitation on the power of the states." *A & P Tea Co. v. Cottrell*, 424 US 366, 370-371 (1976)

At the very foundation of our republic lies the Commerce Clause. Its purpose is eloquently set forth in *H. P. Hood & Sons v. Dumond*, 336 US 525 (1949) as follows:

> "Our system, fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes

> will withhold his export, and no foreign state will by customs, duties or regulations exclude them. Likewise every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." 336 US 525, 539

This court has long recognized that one political subdivision of this nation may not prohibit the export of its natural wealth to another. This court on numerous occasions has struck down efforts such as the one before it here in order that the paramount constitutional interest in preventing the Balkanization of the United States economy be preserved. Efforts by local interests to keep local product within man made political boundaries have long been condemned, for as this court clearly saw in *West v. Kansas Natural Gas Co.*, 221 US 229, 255-256 (1911):

> "The statute of Oklahoma recognized [gas] to be a subject of intra-state commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation . . . if the states have such power a singular situation might result. Pennsylvania might keep its coal, the northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? . . . If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

Surely, this court will not, in ruling on the propriety of a preliminary injunction, give its assent to a facial and outright prohibition of commerce.

The district court recognized the legitimate purposes for which the County of Imperial may wish to employ its police power and concluded that the instant regulation was not within them. In the federal district court's words:

> "There are many legitimate regulations which the police power would permit the County to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc." (B-10)

The regulation before this court is, on its face, a flat prohibition against interstate commerce untempered by an even minimal interest in land use regulation or water conservation. (C-7-9) As this court has made clear in *Hughes v. Oklahoma*, ... US ..., 60 Led.2d 250, 99 S.Ct. 1727 (1979):

> "Such facial discrimination by itself may be a fatal defect, regardless of the states purpose . . . At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives." ... US ..., 60 Led.2d 250, 262.

It was Oklahoma's choice of an outright ban as opposed to the least discriminatory alternative that this court was critical of in *Hughes, supra*. So it is with the case at bar. More than ample means exist for the County of Imperial to protect whatever legitimate local interests exist without the implementation of an outright ban on interstate and foreign commerce. The County's *home embargo* is simply an inexcusable exertion of local governmental power, unrequired in any land use or conservation context. The County of Imperial's objection to the appellate court's direction to decide the case in light of *Hughes v. Oklahoma, supra*, is without merit. *Hughes, supra*, is not only on point, but is controlling.

B. California Doctrines as to Water Ownership Are Irrelevant for Commerce Clause Purposes.

It was not until respondents read the County's brief on the merits that they learned that the restriction in Mc-

Dougal's use permit was really an application of California water law apparently intended to regulate appropriation among overlying owners. Throughout the California court proceedings the County appears to have believed it was enforcing a land use regulation. Reading of the petition for writ of certiorari would give no clue to the County's contention that its restrictions are a matter of California water law.

The ability of the State of California and its political subdivisions to regulate ground water appropriation is not involved in this case nor does the district court's injunction bar the County from doing so. The litigation pending before the district court is simple in nature. If McDougal has water for sale, may the County preclude him from selling it to plaintiffs? The litigation does not involve California water law.

California water law is interjected by the County as a means of explaining away, from the County's view, the devastating effect of *Altus, Oklahoma v. Carr*, 255 F.Supp. 838 (W.D. Tex. 1966), Aff'd 385 US 35 (1966) on its position. The County claims California water law, known as the Correlative Rights Doctrine, is more similar to the riparian rights law applied in *Hudson County Water Co. v. McCarter*, 209 US 349 (1908) than it is to the Texas law of appropriative rights applied in *Altus, supra*, and that its embargo should therefore be enforced. This over simplifies the California rule, totally mistakes its history and ignores the fact that ownership in the first instance is not relevant.

Trying to decide whether California's water law is more riparian than appropriative will lead us nowhere, for the fact is its neither. The California Supreme Court's decision on which the County relies for its point, *Katz v. Walkinshaw*, 1 Cal.116, 70 P.663, 74 P.766 (1903), was the culmination of several cases attempting to decide whether California

would follow the riparian or appropriative doctrine, all arising in the rough and ready world of miners and cattle barons. In fact, it was the natural outgrowth of the California Supreme Court's decision in *Lux v. Haggin*, 69 Cal.225, 10 P.674 (1886) where it decided in a 200 page opinion by a 4-3 vote that riparian rights coexist with appropriative rights, thus recognizing two radically different kinds of water rights in the same stream.

Stated simply, respondents may, with equal basis in California case law, claim California's water law is more appropriative than riparian but such an endeavor would not answer the question, would confuse the issue and lead to decision making by label application. What is at stake here is the County's ability to exclude *buyers*, not its ability to preclude McDougal's *appropriation* for the latter *is not* affected by the district court's preliminary injunction. (B-10-11)

In California, water use may be formally allocated among users in one of two manners. Individual competing water users may bring an action to create what is known as an "adjudicated ground water basin"[5] or the County of Im-

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[5]There are six such "adjudicated ground water basins" in Southern California: *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 123 Cal.Rptr. 1, 537 P.2d 1250 (1975); *Pasadena v. Alhambra* 33 Cal.2d 908, 207 P.2d 17 (1949); *California Water Service Co. v. Side Botham & Son* 224 Cal.App.2d 715, 37 Cal.Rptr. 1 (1964); *California Water Service Co. v. City of Compton*, Civil No. 506806, Los Angeles County Superior Court, California, August 22, 1961; *Mojave Water Agency v. Abbey*, Civil Nos. 130759 and 152413, San Bernardino County Superior Court, California, dismissed June 7, 1976; *Chino Basin Municipal Water District v. City of Chino, et al.*, Civil No. 164327, California Superior Court, San Bernardino County, California, January 27, 1978.

perial may avail itself of the statutory scheme of regulation in an area pre-empted by the State of California.[6]

Once McDougal has appropriated the water and is storing it it gains the same status as captured water in *Altus, supra.* This court's decision in *Hudson County Water Co., supra,* involved riparian rights and the ability to capture the water, not what may be done with it after it has been reduced to possession. The sale of water from storage tanks does not involve the same kind of state interests considered in the physical diversion of a river's course of flow from one state to another as was the case in *Hudson County Water Co., supra.*

The County in seeking to avoid *Altus, supra,* bases its water argument in an unfathomable ownership distinction. Constitutional questions and the permissibility of export bans may not be decided by the application of labels such as "ownership." As this court observed in *Hughes, supra:*

> "The fiction of state ownership may no longer be used to force those outside the state to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." ... US ..., 60 Led.2d 250, 263

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[6]The State of California by the enactment of the California water code has pre-empted the area of water regulation and given the authority to prevent waste, unreasonable use or unreasonable method of diversion of water in the state to the Department of Water Resources. California Water Code §275. Additionally, the State of California has adopted a comprehensive scheme for the regulation of the diversion and/or appropriation of ground water. California Water Code §§60000 *et seq.* The California regulatory scheme for water management requires the formation of special districts by vote of the residents of the proposed district. California Water Code commencing at §60080. Water quality control, in situations where excessive ground pumping (over drafting) impacts basin wide quality, is governed by Sections 2100 and 2101 of the California Water Code.

The banning of water for sale in interstate or foreign commerce is simply an invidious discrimination against outsiders, and as such constitutes a *home embargo*. The last minute injection of California water law, with the concomitant merry-go-round in deciding if its more riparian than appropriative, is a red herring and in no way affects the holding in *Altus, supra*, or its application here. If the County of Imperial is now, or ever was interested in allocating water use among competing interests, then respondents suggest that it put its conduct where its brief is and follow appropriate statutory proceedings and stop interfering with respondents' constitutional rights.

The County of Imperial could have, and may now exercise its police powers in a non-discriminatory manner. It is the outright ban here, as in *Hughes, supra*, that is fatal to the County's position. The County's attempted regulation like the State of Oklahoma's must fall before the paramount interests embodied in the commerce clause.

II.

NO FINAL JUDGMENT ON THE CONSTITUTIONALITY OF THE COUNTY'S EMBARGO AGAINST THE EXPORT OF WATER EXISTS.

A. Res Judicata Is Not Applicable.

For this court to bar the present action it must find that the California Supreme Court entered a final judgment on the constitutionality of the County's embargo. The first requirement of the application of *res judicata* is a final judgment involving the same cause of action. *Lawlor v. National Screen Service Corp.*, 349 US 322 (1955); *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). The California judgment does not vest the County with a shield to cover its unconstitutional interference with interstate and

foreign commerce, for as the California Supreme Court made clear:

> "We need not decide whether the prohibition against the export of water was valid. (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 255 F.Supp. 838") (C-6, Fn. 2)

To circumvent the California Supreme Court's plain language the County maintains that since the original action sought to enforce the County's zoning ordinance and halt the export of water the refusal to rule on the embargo's constitutionality brought about its enforcement, *ergo* a final judgment on the same cause of action. Such reasoning ignores the basic difference between the two suits. In *County of Imperial, supra,* the County sought a wide variety of relief prohibiting the violation of its zoning laws by employing tank trucks to carry large amounts of water from the well for export without a use permit. (C-1-2) These respondents do not seek to preclude the County from enforcing *any* of its *land use regulations,* they seek only relief from a *home embargo* which sets them apart from the general class of prospective purchasers.

The prior action was grounded in California zoning law and dealt with the rights of an owner to carry on a business "without a conditional use permit." *County of Imperial, supra.* (C-1) In the present action respondents seek to avail themselves of the rights, privileges and immunities found in the United States Constitution Commerce Clause as purchasers of water.

The basis of the Superior Court's judgment in *County of Imperial, supra,* as tested on appeal, was that the condition in question, "was to prevent an intensive land usage on the premises which would be incompatible with surrounding residential land uses and to thus protect the general welfare" and "was not intended to directly burden or interfere with

international commerce." (61a-62a) In reversing that notion, the California Supreme Court held:

> "The evidence relied upon by the County is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead the commission, after extensive discussion of the water problem, issued the permit conditioned only upon a limitation of the export of water, in a resolution that referred only to that issue. Under these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, *i.e.*, a prohibition against exporting water from the county." (C-8-9)

The court thus disposed, on the merits, of the bulk of relief sought by the County. Contrasted with the affirmative holdings in reversing the trial court on land use issues the California court declined to reach the asserted unconstitutionality of the *home embargo* because the particular defendant in that action, McDougal, was estopped to raise it. In the court's view McDougal could not accept and rely on the benefits of the permit and at the same time challenge its burdens.

This failure to decide the constitutional issue resulted by default in its enforcement. It is California's non-decision that the County wishes to affirmatively assert as *res judicata*, not the court's actual holding. The County seemingly argues, "we lost all of the issues, save the one that was never decided, therefore the resulting enforcement of the *home embargo* is *res judicata*." It must be clear that the litigation presented in this case varies in scope and remedies sought and that the California court has never rendered a final

judgment on the embargo's constitutionality. That which did not occur cannot be *res judicata*. It is clear, both in California and federal courts, that principles of *res judicata* may not be asserted when a court, after an issue has been presented it, refrains from determining it. For, as the California Supreme Court has stated:

> "A judgment is not an adjudication as to matters which the court expressly refrains from determining," *Stark v. Coker* 20 Cal.2d 839, 843, 129 P.2d 390 (1942)[7]

In attempting to show that the present suit relative to the right to engage in interstate and foreign commerce is the same cause of action as advanced by the County in its prior effort to enforce it zoning ordinance, the County cites Professor Moore's treatise for the proposition that of the various tests of *res judicata* one is "whether there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights established in the first judgment." (P. 18 Petitioner's Brief)

It is clear that a judgment in the instant matter would not impair "rights or interests established" in the first judgment. The only rights or interests established in *County of Imperial v. McDougal, supra,* which may be asserted as *res judicata* or collateral estoppel were:

> (1) That the County's export prohibition is just that and *is not a land use restriction;* and
>
> (2) That *McDougal is estopped* to contest the validity of the export restriction.

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[7]In accord: *DePinto v. Landoe,* 411 F.2d 297 (1969); *Poster Exchange v. National Screen Service Corp.,* 517 F.2d 117 (1975); *Baltimore & O.R. Co. v. New York N.H. & H.R. Co.,* 196 F.Supp. 724 (1961); *Bleeck v. State Board of Optometrists,* 18 Cal.App.3d 415, 95 Cal.Rptr. 860 (1971); *Estate of Doyle,* 202 Cal.App.2d 434, 21 Cal.Rptr. 123 (1962); *Estate of Liddle,* 162 Cal.App.2d 7, 328 P.2d 35 (1958); Witkin, *4 California Procedure, Second,* 3348.

The district court's preliminary injunction in no way impairs the California Supreme Court's judgment that the export prohibition is not a land use regulation. In fact, the district court's opinion in entirely consistent with that judgment:

> "The court wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water . . . there are many legitimate regulations which the police power would permit the County to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc. The California Supreme Court noted that on remand the superior court could reach just such issues (19 Cal.3d at page 513), and nothing in the instant opinion is to be construed to the contrary." (B-10-11)

The preliminary injunction in no way impairs the California judgment that McDougal could not contest the constitutionality of the home embargo while seeking to rely on his use permit. McDougal is not challenging the use permit restriction, non-parties are. California's interests in closing the doors of its courts to permit holders such as McDougal are maintained. There are a variety of use restrictions which owners are estopped to challenge which are not constitutional in nature and the court's judgment in that regard is unimpaired.

The County argues that it is the "fruit" of their litigation with McDougal, the estoppel induced enforcement of its *home embargo*, which will be impaired. Unfortunately, that embargo's validity was not the court's judgment. Its enforcement was simply the by-product of the application of the state law of estoppel to McDougal.

Stated as simply as respondents can put it, no judgment exists as to the constitutionality of the County's *home embargo*. To bar these plaintiffs by virtue of *res judicata* would be to expressly hold that once a seller of goods is estopped in a state court to assert that he must sell those goods to all persons regardless of race, color, creed or intent to engage in interstate and foreign commerce is to assert that the whole world is barred by *res judicata* from ever raising a question which was not decided in a state court. Such a result is clearly not consistent with the first principles of justice, due process, *res judicata* or the Constitution.

III.

RESPONDENTS ARE NOT IN PRIVITY WITH McDOUGAL.

A. Respondents Did Not Participate in the Prior Proceedings in Any Manner Which Would Give Rise to Res Judicata or Collateral Estoppel.

Humberto Martinez, Juan DeLeon and Guillermo Gallego Munoz are not now, nor have they ever been parties to litigation with the County of Imperial or its co-defendant McDougal. Nowhere in the record is there any connection between these litigants and *County of Imperial v. McDougal, supra,* save the fact that one of them signed a declaration (64a-66a) which McDougal affixed to his answer and subsequently appeared as *amicus curiae* before the California Supreme Court (67a-84a).

The County in its haste to foreclose these litigants from their day in court absolutely ignores the status of Messrs. *Martinez* and *DeLeon* in its arguments. The County continually equates Munoz' declaration and *amicus* appearance with the *participation* in a lawsuit required by the principles of *res judicata* to bar not only Mr. Munoz, but Martinez and DeLeon who signed no documents and made no appearances. The argument that Munoz is somehow in privity

with McDougal is weak enough, let alone that his conduct binds Martinez and DeLeon who are absolute strangers. The only connection between Martinez, DeLeon and McDougal is that they agree with the argument that McDougal was estopped to argue: that the *home embargo* is unconstitutional.

It is beyond refutation that Munoz' two affirmative acts are insufficient to bind him to the judgment in *County of Imperial v. McDougal, supra*. First of all, the innocuous declaration filed by McDougal (64a-66a) cannot give rise to res judicata. Petitioner cites no authority, and respondents could find none, for the proposition that signing a declaration under perjury gives rise to *res judicata*. Respondents would note that to apply res judicata to such conduct would lead to an absolute scarcity of declarants, deponents and witnesses in future litigation.

With respect to the filing of an *amicus* brief, it is a certainty that Munoz was not bound by the ultimate decision, for as this court has said:

> "It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions." *Stryker v. Crane*, 123 US 527, 540 (1887)[8]

In commencing its discussion of the participation in the prior litigation, the County cites a rule in support of its contention that it claims to have derived from Professor Moore:

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[8]California is in accord. Witkin, *3 California Procedure, Second*, 1891.

> "If a nonparty, who *thus* participates in litigation has an interest sufficiently close . . . the participating non-party should be bound . . ." (Emphasis added) (P.20, Petitioner's Brief)

The word, *thus* in the cited portion of course indicates that there is a missing subject matter. What is omitted is the portion of the text, the subject matter in which the editor discusses what a person who is a non-party may do to influence the litigation which would lead to his being bound:

> ". . . if an interested non-party is unable, or does not wish to intervene, by what methods can be protect his interests? He can offer himself as *amicus curiae*, but an amicus curiae does not have the status of a party; cannot as such, exert any control over the course of the litigation; and is neither bound nor benefited by the conclusive effect of the resulting judgment. If an interested non-party's status as *amicus curiae* would not provide sufficient scope for the protection of his interests, and the non-party is not able to or does not desire to intervene, he has at least two alternatives from which to choose; he may bring his own suit, possibly for declaratory judgment; or he may be able to take control of the suit to which he is a non-party.
>
> "If a non-party who *thus* participates in litigation has an interest sufficiently close . . . the participating non-party should be bound." 1B *Moore's Federal Practice*, §0.411[6]

It may be seen therefore that petitioners have excised the subject matter so that one who did not carefully examine the cited pages would not know that Professor Moore was actually setting forth a two fold test to bind a non-party: (1) he must *take control* of the litigation and, (2) have an interest sufficiently close to be bound.

Elements of control which might bind a non-party are discussed in the *Restatement Of The Law Of Judgments, Second,* as follows:

> ". . . to have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain appellate review . . . whether his involvement in the action is extensive enough to constitute control is a question of fact, to be resolved with reference to these criteria. It is sufficient that the choices were in the hands of the counsel responsible to the controlling person; moreover the requisite opportunity may exist even when it is shared with other persons. It is not sufficient, however, that the person merely contributed funds, or advice in support of the party, or merely appeared as amicus curiae." *Restatement Of The Law Of Judgments, Second,* Section 83, Comment (C).

Even if we were to find that Martinez, DeLeon and Munoz controlled the McDougal litigation, of which there is absolutely no proof, such control would only bar the controlling non-party with respect to issues determined. This results from the fact that "his assumption of control does not make him a party to the litigation." *Restatement Of The Law Of Judgments, Second,* §83, Comment (B). See also, *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.*, 24 Cal.App.3d 410, 100 Cal.Rptr. 826 (1972), upon which illustration 3 of the *Restatement Of The Law Of Judgments, Second,* §83 is based. Thus, if respondent *Munoz* was found to control the litigation in the sense previously set forth (effective choice of legal theories, proofs, opportunity to obtain appellate review) *he* would only be precluded from testing the two issues determined: (1) the condition is not a land use regulation and, (2) McDougal, as successor to the original person who obtained the use permit, may not

contest the constitutionality of the restriction. He would not be precluded from testing issues never decided.

There are no assertions that Martinez and DeLeon were even involved by way of knowledge of the prior proceedings let alone that they took control to the point of being bound. Nor are there assertions that Munoz had control, only that he signed a declaration and appeared as amicus curiae. It goes without saying that these parties were not in control of the prior litigation within the context of case law and treatises cited by the County for such a proposition. They are therefore, not bound.

B. Respondents' Interests and McDougal's Interest Were Not Identical for Purposes of Res Judicata.

The County wishes to tar non-parties with McDougal's estoppel because, (1) Munoz is McDougal's broker for the sale of water, (2) Munoz shared an outcome in the litigation and, (3) if the seller cannot sell, the buyer cannot buy. Several cases are cited for the proposition that non-party privy may be bound.[9]

Certain rules relative to this concept are set forth by the County at Page 21 of its Brief as derived from *Southwest Airlines Co. v. Texas Intern. Air Lines*, 546 F.2d 84 (1977). In *Southwest, supra*, the court noted that the contractual and representative essence of the doctrine of privity is iden-

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[9]For example, *Souffront v. La Compagnie des Sucreries del Porto Rico*, 217 US 475, (1909) which stands for the proposition that where Spanish and French law allow a vendor no longer in title to maintain an action on behalf of his vendee, US courts will recognize the rights of the vendee and his successors to benefit from the results even though under general rules, *res judicata* would not result since no one is in privity to a judgment where he obtained title to the property *prior* to commencement of the suit by his grantor. Additionally, the case stands for the proposition that one who prosecutes or defends a suit in the name of another may be bound by the judgment. Neither proposition relates to the case at bar.

tified with the party trustee to his non-party bondhold while at the same time rejecting lessor-lessee as among the relationships requiring preclusion. Finally, the rule of *Southwest, supra,* was simply this: all attempts to find privity were rejected except one:

> "The proposition that governments may represent private interests in litigation is clear." 546 F.2d 84, 98.

Southwest, supra, is of no comfort to the County for although it qualifies as a government it cannot be said it represented these private interests. What it did, and is still trying to do, is emasculate these respondents' constitutional right to engage in interstate and foreign commerce.

Turning to the community of interests and identity, Martinez, DeLeon and Munoz had with the losing party in *County of Imperial, supra,* it could reasonably be said that all respondents were in sympathy with McDougal. Any pretense of identity of interests, however, evaporated when the California District Court of Appeal ruled the restriction in question to be an absolute bar of interstate commerce and precluded by virtue of the United States Constitution thereby rendering McDougal's use permit *void*. By the time the case arrived at the California Supreme Court there was a clear divergence of interest between McDougal and Munoz (the only respondent here who knew about the litigation). McDougal sought at all costs to retain his use permit while Munoz sought to argue the constitutional issues. Any identity of interest between Munoz and McDougal was then and is now, tenuous at best.

The identity of interests between DeLeon, Martinez and McDougal is absolutely and completely missing. Nowhere in the record does it even appear that they were even apprised of the prior litigation. To foreclose Martinez and DeLeon, let alone Munoz, would make a shambles of the require-

ments of privity that the non-party sought to be bound have an identity or community of interest with and adequate representation by the losing party in the first action.

More importantly, it is hard to see how any of these respondents' interests were adequately represented by McDougal. Certainly arguments in which they were interested and would be benefited by were advanced by McDougal. Yet, it strains credibility to assert that they received their day in court at the hands of the one individual who, by his conduct, was estopped to raise the very issues they would be interested in. McDougal cannot be said to be representative of respondents for in order to be representative he would have to have been in a position which would allow, not preclude, the court to reach the issue of the *home embargo*.

How can these respondents rely on a person who is estopped to raise the issue of constitutionality to adequately represent their interests in challenging that very constitutionality. To state the question is to answer it: McDougal could not and did not stand in their shoes so that *res judicata* might forever deny them federal vindication of their constitutional rights.

C. The Argument That if the Seller Cannot Sell, the Buyer Cannot Buy Is Circular.

The County argues that since McDougal is bound by the export restriction all prospective purchasers must likewise be bound, since they can acquire no greater rights than the owner of the land. The argument misses the point for respondents claim no ownership rights in the land for they have none. What the County is really saying is that since McDougal is precluded by county law from selling to respondents, they have no rights to buy. A circular argument at best.

The fact is that McDougal has a right to sell as much water as he can, using as intensive a commercial trucking operation as he may, without running afoul of California nuisance laws. The instant litigation does not affect McDougal's rights in the land for his operations in pumping and commercial intensity are unrestrained. McDougal could conceivably carry on a massive bottled water program of his own for sale to residents of Imperial County involving double the water and trucks. The question before this court is not "may respondents gain greater rights in land than the owner" but may a local county, relying on a conditional use permit, determine that purchasers may not engage in interstate and foreign commerce. To say since the seller may not sell to designated classes, therefore those classes cannot buy due to *res judicata* is not only no answer to the question posed but opens pandoras box. If the argument is correct then the forces intent on abridging and denying civil rights will have gained a potent weapon. Would that future owners of the Heart of Atlanta Motel, and those similarly disposed, could rely upon the principle that if the seller is estopped to challenge a provision in his use permit barring sales to certain classes of buyers the buyers would likewise be precluded from challenging the restriction due to *res judicata, eg., Heart of Atlanta Motel, Inc. v. United States* 379 US 241 (1964).

D. The Prior Proceedings Were Not In Rem.

Although the mechanistic use of *In Rem v. In Personam* Judgments found in *Pennoyer v. Neff*, 95 US 714 (1878) was essentially disposed of in *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950) the County asserts that its prior litigation was *in rem* albeit there is a dearth of authority on the point (Petitioner's Brief P.22), and that the whole world is thereby bound by McDougal's estoppel.

One need look no further than *Hansberry v. Lee*, 311 US 32 (1940) to put this notion to rest.

Hansberry, supra, involved litigation by a land owner seeking to enforce a restrictive covenant barring Negroes from an Illinois neighborhood. Since prior Illinois state litigation found that owner's agreement to be a binding covenant running with the land, land owner Lee sought to enforce through *res judicata* that covenant against successor in interest and land owner Lee. This court characterized that judgment as *in personam:*

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he has not been made a party by service of process . . . (citations omitted) . . . in the judgment for the latter." 311 US 32, 42, 43 (1940)

As the prospective sellers in *Hansberry, supra*, could not stand in judgment for future buyers such as Lee, seller McDougal could not and did not stand in judgment for future buyers Martinez, DeLeon and Munoz.

E. The State of California Has No Interests in Barring Respondents From Their Day in Court.

The State of California has no interests whatsoever in the application of *res judicata* against non-parties to issues its courts have never decided. The states only interest, that McDougal not be allowed access to state courts to contest a use permit restriction due to estoppel is unimpaired.

Federal interests would, however, clearly be subverted by applying *res judicata* in these circumstances. Non-party litigants would be denied access to federal courts to redress a constitutional wrong that no state, let along the County of Imperial, may by the very terms of the Constitution have an interest in perpetuating. A basic denial of due process

would occur for simple state grounds of estoppel would be elevated above the constitution itself. Surely *res judicata* in the federal courts, applying federal law, *Heiser v. Woodruff*, 327 US 726 (1946), would not place state estoppel of McDougal above the constitutional mandates of the commerce clause and due process as asserted by Martinez, Deleon and Munoz, non-parties. Application of *res judicata* would run counter to every involved federal policy while its non-application would impair no legitimate state interest. Application of *res judicata* to non-parties would sanction the deprivation of their rights in an action in which they were not parties and further lend support to the long discredited concept that the government (County of Imperial) may condition the consent to perform lawful activities on the exaction of unconstitutional prices.[10] Finally, a blatant *home embargo* contrary to the basis upon which the constitution was founded would be left intact.

IV.

28 USC 2283 DOES NOT BAR THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT.

A. No State Court Proceedings Have Been Enjoined by the District Court.

It is just not true that the district court enjoined California state court proceedings. Contrary to the County of Imperial's recitation of cases such as *Hill v. Martin*, 296 US 393 (1935) it is significant that the district court's injunction runs *only* to County officials and not to California courts. The evils which *Hill v. Martin, supra*, and the other decisions the

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[10]For the doctrine of unconstitutional conditions, see *Terral v. Burke Construction Co.*, 257 US 529 (1922); *Frost v. R.R. Commission*, 271 US 583 (1925); *Wheeling Steel Corp. v. Glander*, 337 US 562 (1949); *Gomillion v. Lightfoot*, 364 US 339 (1960); *Garrity v. New Jersey*, 385 US 493 (1967); and *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 884 (1946).

County cites seek to avoid are of the type that, (1) parties ought not be in a position of having to obey two conflicting decisions, and (2) the practical result of a federal injunction should not be the actual barring of state court proceedings. Neither of those principles were violated by the district court's order.

The federal district court merely enjoined *enforcement of the use permit by the County*; it issued no order affecting the state court's outstanding injunction. Rather, it left that court free to decide for itself the effect of the federal court proceedings. In point of fact the validity of this analysis is borne out by the actuality of state court proceedings against McDougal in the form of a contempt citation. (D-4)

California statutory and case law recognizes the inherent authority of a court to enforce its own orders without the necessity of affirmative action by the parties.[11] The federal district court's order in no way lessens the state court's authority or enjoins its conduct of its own proceedings as witnessed by the *fact* that *it did proceed*. Any argument over contempt between McDougal and the California judiciary about his choice to sell water without first seeking a modification of the state court injunction based on the federal court ruling is between him and the state court and the federal injunction running against the County's conduct is in no way involved. That action is now running its course through California courts free of the district court's interference.

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[11]California Code of Civil Procedure §128: "Every court shall have power: . . . (4) to compel obedience to its judgments . . .;" CCP § 177: "Every judicial officer shall have power: . . . (2) to compel obedience to his lawful orders . . .;" CCP §178: "For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt . . .;" *In Re McKinney*, 70 Cal.2d 8, 74 Cal.Rptr. 580, 447 P.2d 972 (1968).

Our dual judicial system *is* operating without the presence of the conflicting orders between federal and state courts which 28 USC 2283 is designed to prevent. The California courts have recognized this by staying their proceedings pending decision on the federal questions. The federal court has not, as demonstrated by the fact of McDougal's contempt citation, enjoined state court proceedings and 28 USC 2283 is therefore not applicable.

B. 28 USC 2283 Will Not Bar a Preliminary Injunction at the Suit of Those Who Have Never Had Their Day in a Federal or State Forum.

The County of Imperial seeks to place 28 USC 2283 as a barrier between three citizens of the Republic of Mexico and their first and only challenge of the enforcement of an unconstitutional *home embargo*. These plaintiffs do not seek to avoid a land use regulation nor does the County of Imperial seek to enforce one for none exists. The County of Imperial does not seek to enforce a judgment against these plaintiffs, for none exists. Neither the County of Imperial or the respondents are before this court testing the police powers of the County of Imperial to prevent nuisances or protect the County's water supply for the district court's injunction bars neither. The County of Imperial raises 28 USC 2283 as a sword solely for the purpose of preventing interstate and foreign commerce between the Republic of Mexico and the County of Imperial. Respondents seek simply to purchase and transport pure, sweet and clear water to their compatriots in the Republic of Mexico who continue to suffer from the increasing salinization of the Colorado river.

The issues of federalism embodied in 28 USC 2283 are cleverly raised by the County to mask its real intent by

mechanically applying the statute to prevent a non-existant friction between the state and federal judicial system.

The "anti-injunction" statute's original purposes have never been clear but have long been subject to debate, scholarly pursuit, and judicial interpretation. One need turn no further than the contrasting analysis by the majority and dissent in *Atlantic Coast Liner Co. v. Brotherhood of Locomotive Engineers*, 398 US 281 (1970) to demonstrate this debate. For a compelling discussion of the statute's venerability, see the exhaustive efforts of Professor Mayton in *Ersatz Federalism Under the Anti-Injunction Statute*, 78 Columbia Law Review 330.

Whatever view one might take of the statute's original *raison d'etre* the one point in fact upon which all parties to the debate have agreed is that it does not bar injunctive relief in favor of those who have never had their day in court. The statute has never been applied against third parties raising federal constitutional issues.

The shifting emphasis of policies underlying the statute culminated in Mr. Justice Frankfurter's majority opinion in *Toucey v. New York* 314 US 118 (1941), where the court opted for a stringent application of the statute disavowing all exceptions to its application save those expressly authorized by congress. *Toucey, supra*, was subsequently overruled by the U.S. Congress as noted by this court in *Mitchum v. Foster*, 407 US 225 (1972):

> "The Congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC 2283, which, as the Revisors Note makes evident, served not only to overrule the specific holding of *Toucey* but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." 407 US 225, 236

To determine the availability of 28 USC 2283 as a shield or a sword in a particular transaction, the court in *Mitchum, supra*, made it clear that it was necessary to determine what the law surrounding the statute was prior to *Toucey, supra*. (id)

In an effort to seek out the law prior to Mr. Justice Frankfurter's 1941 majority opinion in *Toucey*, one need look no further than the same Mr. Justice Frankfurter's 1939 majority opinion in *Hale v. Bimco Trading Co., Inc.*, 306 US 375 (1939) wherein the court concluded that third parties are not barred by the anti-injunction act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state court.[12] The case at bar is a virtual reincarnation of *Hale, supra*, with the County of Imperial playing the role of the State of Florida, its co-defendant McDougal playing the role of Hale and respondents Munoz, Martinez and DeLeon seeking relief similar to that sought by the Bimco Trading Company. The similarities are numerous:

1. The State of Florida sought a writ of mandamus requiring Hale to enforce a statute requiring the payment of fees prior to the importation of foreign cement by companies like Bimco; the County of Imperial sought in injunction against McDougal flatly forbidding the sale of water for use in interstate and foreign commerce.

2. In *Hale, supra*, the Florida Supreme Court issued the writ commanding the statute's enforcement and specifically held it valid as against a constitutional challenge premised on the Commerce Clause; the California Supreme Court

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[12]Even the *Toucey v. New York, supra*, court explicitly recognized the viability of the decision in *Hale v. Bimco, supra*, at 314 US 118, 137 N.7

upheld the injunction, in part, but unlike the Florida court in *Hale, supra,* refused to decide the constitutional question.

3. The Florida Supreme Court stayed the mandamus proceedings against Hale while a third party — Bimco Trading Co., Inc. — pursued its federal remedies in a separate suit against Hale and the State of Florida; in the case at bar, the California Superior Court and Court of Appeal have stayed state contempt proceedings brought against McDougal while third parties — Munoz, Martinez and DeLeon — pursue their separate suit against the County of Imperial and McDougal. (D-3)

4. The regulation enforced in *Hale,* like the regulation sought to be enforced here was unconstitutional on its face.

To the suggestion that 28 USC 2283 precluded relief to third parties litigant in *Hale, supra,* Mr. Justice Frankfurter said it all when he observed:

> "To invoke Section 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute bars injunctive relief in a United States District Court against the enforcement by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceedings bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. *Chase National Bank v. Norwalk,* 291 US 431, 441, 54 S.Ct. 475, 479, 78 L.Ed 894.
>
> ". . . The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive exercise of authority by a United States court. On the contrary, in staying 'all further proceedings and action' until this court had finally passed upon its constitutionality, the Supreme Court of Florida recognized

> the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues." 306 US 375, 378

Hale v. Bimco Trading Co., Inc., supra, controls the issue at bar. The conclusion follows not only in light of the virtual identity of circumstances but is compelled as a result of the factual differences. In *Hale, supra,* the state court specifically held the statute in question to be constitutional, while the California Supreme Court refused to decide the constitutionality of the *home embargo*. In spite of the Florida court's ruling that the statute was constitutional, the US Supreme Court upheld the injunction at the suit of third parties and had no difficulty in setting aside the state's statute:

> "Such assumption of national powers by a state has, ever since March 12, 1827 (*Brown v. Maryland,* 12 Wheat, 419 L.Ed 678) been found to be in collision with the Constitution. It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state." 306 US 375, 380

Thus, if injunctive relief will lie at the hands of third parties even when the state's highest tribunal has decreed the regulation in controversy to be constitutional, respondents submit that they must be entitled to injunctive relief where California's highest court refused to decide the constitutionality of the restriction in question. Like Mr. Justice Frankfurter in *Hale, supra,* respondents here cannot imagine an enactment "more clearly designed then the present to circumvent what the Commerce Clause forbids." 306 US 375, 380

C. If 28 USC 2283 Were Applicable, the District Court's Order Was in Aid of Jurisdiction and as Such Exempt.

It would be fruitless for a federal court to determine that a state practice violated the US Constitution without issuing

an order to end the practice. It would seem that a declaratory judgment is not necessarily binding on state officials. See concurring opinion in *Steffel v. Thompson*, 415 US 452, 482 (1974).

The "in aid of jurisdiction" exception should not be limited to "in rem" cases (which the County claims this is, P. 22, Petitioner's Brief) but should be available in cases involving federal questions. *Tampa Phosphate R. v. Seaboard Coastline R.R.*, 418 F.2d 387 (1969); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61 (1968); Mayton, *Ersatz Federalism*, 78 Columbia Law Review 330, 357-363. The district court might, therefore, take the ordinary and accepted step of enjoining enforcement by *County officials* in aid of its jurisdiction.

The federal district court, once it acquired subject matter jurisdiction over the Commerce Clause issues over which the state courts have abandoned jurisdiction is surely free to preserve its jurisdiction until the suit is completed.

Not only is the district court the *only* court with a subject matter jurisdiction over the Commerce Clause issue, it was the first and *only* court with the jurisdiction over the parties. The California courts never had, or ever asserted they had, jurisdiction over those parties who never had their day in court: Messrs. Munoz, Martinez and DeLeon. 28 USC 2283 does not present a bar where the federal court was the *first* court to obtain jurisdiction over the parties, and the *only* court with jurisdiction over the subject matter. A decent respect for the California Supreme Court does not require us to deny these litigants their remedies against the County of Imperial.

In this case, the court enjoined *only* the County and left to the state court the discretion to determine what effect it would give to the federal proceedings. Certainly, this limited

step was "*necessary*" in order to properly vindicate the federal court's jurisdiction. Such an injunction in order to implement federal question jurisdiction is an accepted part of the "in aid of jurisdiction practice" that congress in 1948 incorporated and embodied in its re-enactment of the "anti-injunction statute." See, Mayton, *Ersatz Federalism*, *id*, at 357 N.161, 363, 367.

D. The Instant Litigation Is Within the Civil Rights Act and as Such Is a Specifically Authorized Exception to 28 USC 2283.

The Civil Rights Act of April 20, 1871, has been a focal point of the instant litigation from the outset. (Clerk's Record on Appeal 218). Respondents have alleged that representatives of the County of Imperial are acting pursuant to County law to discriminate against interstate and foreign commerce in such a manner as to entirely prohibit that commerce. Violations of 42 USC 1983 have been specifically found by all courts of the United States to be exempt from the restrictions of 28 USC 2283 as an express exception. Such was the specific holding of *Mitchum v. Foster*, (1972) 407 US 225.

There can be no question that the rights being litigated by respondents herein are covered by Section 1983 of Title 42 for as the court has noted in *Lynch v. Household Finance Corp.*, 405 US 538 (1971):

> "In *United States v. Price* 383 US 787, 797 . . . we interpreted the phrase, "rights, privileges or immunities secured . . . by the Constitution or laws of the United States," contained in 18 USC 242 to embrace "*all* of the Constitution and laws of the United States." The similar language in §1983 and 1343 (3) was originally modeled on §242's predecessor, §2 of the Civil Rights Act of 1866 . . . In *Price*, *supra*, we said that, "[w]e are not at liberty to seek ingenuous and analytical

instruments'' to avoid giving a congressional enactment the scope that its language and origins require.'' 405 US 538, 549, FN. 16.

Thus it is clear that respondents herein have brought an action for the right, privilege or immunity of operating in foreign commerce with citizens of the United States without being subjected to a *home embargo* by local political subdivisions. That right, privilege or immunity is secured to all people within the jurisdiction of the United States pursuant to 42 USC 1983 and as such, actions to enforce those rights are specifically excepted from 28 USC 2283.

E. This Court's Decision in Vendo v. Lectro-Vend Is Inapposite to Litigation Commenced by Individuals Not Party to Prior State Court Proceedings.

The County of Imperial blandly asserts that this court's interpretation of the so called ''anti-injunction statute'' in *Vendo v. Lectro Vend Corp.*, 433 US 623 (1977) flatly bars the preliminary injunction issued by the district court. In *Vendo, supra,* the federal plaintiffs and state court losers sought to preclude enforcement of a state court judgment by simply shifting the focus of the conflict from the state courts to a federal forum.

Such is not the case at bar: respondents Munoz, Martinez and DeLeon are not losers seeking to avoid an adverse judgment by packing up their rhetoric and shipping it to the federal district court. There were never proceedings involving the instant plaintiffs and there are not now any state actions pending in which they are involved or the constitutional question is presented.

The losers in *Vendo, supra,* had commenced their federal anti-trust action almost concurrently with the Illinois state litigation but allowed it to lie ''dormant'' while they had their day in state court. No such lying in the weeds is present

here. Respondents filed this action asserting their federal constitutional rights as soon as they learned that the constitutionality of the County's *home embargo* would not be decided by the California courts. Munoz, Martinez and DeLeon did not sit on their rights while engaging in state litigation but promptly brought their federal action. Losers seeking to restrain enforcement of a judgment after nine years cannot be said to be in the same category as those who have never been in court seeking to test an issue specifically not decided by a state court. Query, if the *Vendo* case were an action by *Vendo's* customers — much like McDougal's customers Munoz, Martinez and DeLeon — seeking independent federal relief under the anti-trust statutes alleging unlawful efforts by *Vendo* to create a monopoly, fix prices and restrain trade, all to the detriment of those customers, whether or not the result would have been different.

Not only is there an absolute lack of similarity between the case presented in *Vendo, supra,* and the one at bar but it is a classic irony that it should be mechanically asserted in defense of a *home embargo*. It is in the dissent in *Vendo, supra,* that respondents' most compelling argument is presented. Substituting the phrase *home embargo* for "Sherman Act" sums up respondents' views:

> "When principles of federalism are invoked to defend a violation of the Sherman Act [sic. *home embargo*] one is inevitably reminded of the fundamental issue that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great nation:

"It was . . . to secure freedom of trade, to breakdown the barriers to its free flow, that the Annapolis convention was called, only to adjourn with a view to Philadelphia.

"Thus, the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate causes of our national existence down to today.

"So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the Commerce Clause in the new structure of power.

'. . . On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. To it may be credited largely the fact we are an independent and democratic country today.' W. Rutlege, A Declaration of Legal Faith, 24-27 (1947)" 433 US 623, 665

F. Principles of Comity and Federalism Do Not Require the Denial of Injunctive Relief in the Instant Case.

The policy upon which 28 USC 2283 rests is the need to prevent conflict between two judicial systems functioning within the same forum, not to impose an expanded concept of *res judicata* on third parties. To bar those who have never had their day in court from litigating constitutional issues never decided by state courts would be to expand the role of Section 2283 to the point where its procedural proscriptions, designed to allow two judicial systems to function side by side, are elevated above basic principles of due process and the Constitution itself. Such certainly was not

congress' intent. No previously identified policy of federalism will be served by denying those who have never had their day in court access to the federal system.

It cannot be said that congress intended the anti-injunction statute to be applied in such a manner as to rise above the concepts of due process embodied in the Fifth Amendment of the United States Constitution. Application of anti-injunction statute in the present case would elevate it to heights never contemplated by congress. As the Circuit Court of Appeals for the District of Columbia noted in rejecting the contention that federal court plaintiffs were estopped by a previous litigation in which they were allegedly vicariously represented:

> "as the Supreme Court has declared . . . no court can adjudicate directly upon a persons rights, without the party being either actually or constrictively before the court. This basic tenet of due process can hardly be circumvented through the ritualistic invocation of comity." *Consumers Union v. Consumer Product Safety Commission*, 590 F.2d 1209 1221 (1978)

From the earliest times, expressed by Mr. Justice Harlan's dissent in *Ex-parte Young*, 209 US 123 (1907), and up through *Younger v. Harris*, 401 US 37 (1971), this court has been concerned with the potential for review and possible reversal of the highest tribunal of a state's judicial system by a federal trial court. That basic underlying policy has not been breached by the instant injunction. The California Supreme Court has never ruled on the issues presented by these respondents to the federal court. Quite the contrary, this action represents a federal assumption of a federal issue clearly left by the California courts for federal decision.

This court has recently expressed its concern in *Younger v. Harris, supra, Mitchum v. Foster*, 407 US 225 (1972), *Huffman v. Pursue Ltd.*, 420 US 592 (1975), *Doran v.*

Salem Inn, Inc., 422 US 922 (1975) and *Wooley v. Maynard*, 430 US 705 (1977) that notions comity and federalism require that state court proceedings be left to run their course premised on the sound belief that state courts are competent to do their jobs with respect to the enforcement of our Constitution. No violence is done to this policy consideration by the instant injunction, for as it is noted in *Huffman v. Pursue Ltd., supra,* and *Steffel v. Thompson,* 415 US 452, 462 (1974):

> "The relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding."

There are no California state proceedings pending with respect to the federal issue. The state court proceedings have run their course resulting in a purely state decision on independent grounds of estoppel thereby avoiding constitutional questions.

28 USC 2283 does not dictate that respondents here bring their action in the state forum as opposed to the federal forum. The ultimate ramification of the application of 28 USC 2283 in the instant litigation would be to divest the federal court of its diversity and federal jurisdiction forcing the litigants to pursue their rights in the state forum. The congressional policy is to the contrary:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that

> 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction .... The right of party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' " *England v. Louisiana State Board of Medical Examiners*, 375 US 411, 415 (1964).

Raising 28 USC 2283 is simply blatant forum shopping on petitioners part. The instant litigation will not result in a federal court analyzing constitutional questions currently pending before a state court. The state courts of California have recognized this basic truth by staying the contempt proceedings commenced against McDougal after the district court granted its preliminary injunction while awaiting this court's judgment.

The California Supreme Court in no uncertain terms has divested itself and its inferior tribunals from any and all jurisdiction over the subject matter of the Constitution's Commerce Clause. It cannot be said in the face of the recognition by California courts of the exclusive remedy of these respondents to seek federal review that they are somehow barred by the very principles of federalism and comity which the California courts recognized in staying the contempt proceedings. 28 USC 2283 does not apply, nor need it.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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